



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 254 OF 2014

PETER MURIUKI MUTOKAA & 35 OTHERS.....PLAINTIFF

VERSUS

KANG'OROTI KITHAE (In trust for

Jerevasio Ngari Kang'ori and 90 others).....**2ND DEFENDANT**

RULING

1. By a plaint dated and filed on 30th December 2014 the 36 Plaintiffs sued the 91 Defendants herein seeking the following reliefs;

- a. A declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of a portion of all that piece of land known as Mbeere/Kirima/2244 measuring approximately 7,000 acres (The "suit property")*
- b. A declaration that the original title deed of land known as Mbeere/Kirima/2244 measuring approximately 7,000 acres, and all subsequent sub-divisions, transfers and transactions of whatever nature thereat were fraudulently and illegally acquired and as such the Defendants whether by themselves or their servants or agents or otherwise howsoever are holding unlawful and illegal titles and are accordingly trespassers on the same.*
- c. An order of permanent injunction restraining the Defendants whether by themselves or their servants or agents or otherwise howsoever from further subdividing, intermeddling in any way whatsoever (sic) with the suit property either by selling, advertising for sale and or alienating and or disposing off or completing any conveyance or transfer of any sale to third parties.*
- d. An order be issued directing the 90th Defendant, the Land Registrar, Embu County, in respect of all that piece of land known as Mbeere/Kirima/2244, be rectified by canceling all subdivisions and transfers effected thereat to the Defendants in respect of the suit property and reinstate the suit property in the names of the Plaintiffs (sic).*
- e. An order of vacant possession of the suit property as against the Defendants remaining on or continuing in occupation of the suit property.*
- f. Costs of this suit together with interest thereon at such rate and for such period of time as this honourable court may deem fit to grant.*
- g. Any such other or further relief as this honourable court may deem appropriate.*

2. On or about 11th February 2015, the Plaintiff filed an application under **Order 5 Rules 17, Order 49 Rules 7(1) (iii), Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, section 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya** and all other enabling provisions of the law seeking, *inter alia*, an order for substituted service of court process and an order of interlocutory injunction in the following terms;

a. *That this application be placed forthwith before the honourable duty Judge/Deputy Registrar for directions and or orders.*

b. *That this honourable court be pleased to allow and direct that the 1st to 89th Defendants be served with summons in respect of this suit by way of substituted service through print media, being the publication of an advertisement in either the Daily Nation or the East African Standard newspapers and by affixing copies at the Embu High Court Civil registry notice boards.*

c. *That a temporary injunction do issue restraining the 1st to 90th Defendants either by themselves, their agents, servants, employees or otherwise whomsoever from further subdividing, intermeddling in any way whatsoever with the suit property (that is to say Land reference number Mbeere/Kirima/2244 and/or any other subdivisions emanating therefrom) by selling, advertising for sale and or alienating and or disposing off or completing any conveyance or transfer of any sale to third parties pending the final determination of this suit and or further orders of this honourable court.*

d. *That costs of this application be provided for.*

3. On or about 1st September 2015, the 88th Defendant filed a notice of preliminary objection to the Plaintiff's said application on the ground that it was *res judicata*. It was stated that the matters raised in the Plaintiffs' application were similar or substantially similar to an earlier application filed in Kerugoya ELC No 149 of 2015 as consolidated with Kerugoya ELC No 67 of 2014. It was further stated that the Plaintiffs in the present suit were proxies of the parties in the previous suit. The 88th Defendant therefore asked the court to have the Plaintiff's notice of motion dated 11th February 2015 struck out.

4. The advocates for the 88th Defendant filed their written submissions in support of the preliminary objection on 9th July 2017 whereas the Plaintiffs had not filed any submissions at the time of preparation of the ruling. The Advocate for the 2nd – 14th, 16th – 21st, 23rd – 57th, 59th – 64th, 66th – 67th and the 89th Defendants associated himself with the submissions of the 88th Defendant and informed the court that he did not wish to file any submissions.

5. The main question for determination herein is whether or not the Plaintiff's notice of motion dated 11th February 2015 is *res judicata* by virtue of a previous application dated 6th March 2014 in Kerugoya ELC No. 67 of 2014. The court has perused the bundle of documents supplied by the 88th Defendant and filed on 1st September 2015. The court has noted that the subject matter of the previous suit was *Title No. Mbeere/Kirima/3186* which was a sub-division of *Title No. Mbeere/Kirima/2244* which is the subject matter of the instant suit and application.

6. The court has also noted that the parties to the previous suits are not really the same as those in the instant suit although some appear in both suits like the 88th Defendant herein. Although the 88th Defendant has submitted that the instant Plaintiffs are proxies or agents of the Plaintiffs in the previous suit, the court is not satisfied that on the basis of the material on record, the alleged relationship has been established. The parties in the previous and in the instant suit may be clansmen or even relatives but that, without more, may not be sufficient to meet the requirements of **section 7 of the Civil Procedure Act**. Further evidence may be required on this issue at the hearing hereof.

7. It is also evidence from the record that *Title No. Mbeere/Kirima/3186* measures approximately 121 ha whereas *Title No. Mbeere/Kirima/2244* measures about 2714 ha. It cannot be said with any degree of

certainty that a determination on the smaller parcel of land determined all issues relating to the larger parcel.

8. Whereas the court firmly believes that a matter which has been adjudicated upon by a court of competent jurisdiction should not be re-litigated by the same parties, the 88th Defendant has to demonstrate that the requirements for the application of the doctrine of *res judicata* have been met. The relevant provisions of **section 7 of the Civil Procedure Act (Cap 21)** provide that;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”.

9. In the circumstances of this case, the court is not satisfied that there is merit in the preliminary objection raised by the 88th Defendant. There was no demonstration that the requirements of **section 7 of the Civil Procedure Act** have been satisfied in relation to the instant suit or application dated 11th February, 2015. The notice of preliminary objection dated 17th August 2015 is therefore dismissed with costs.

10. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **16th day of NOVEMBER, 2017**

In the presence of Beth Ndorongo holding brief for Mr Millimo for the 88th Defendant and Mr Gekonge holding brief for Mr Okwaro for the 2nd – 14th, 16th – 21st, 23rd – 57th, 59th – 64th, 66th, 86th and 89th Defendants and in the absence of E.K. Njagi & Co Advocates.

Court clerk Njue/Leadys

Y. M. ANGIMA

JUDGE

16.11.17